83024-0

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON DIVISION ONE No: 605283

E.S., Appellant

VS.

Bellevue School District, Respondent

Appellant's Reply Brief



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TABLE OF CONTENTS

	PAGE .
l.	THE COURT SHOULD NOT DISMISS THIS APPEAL AS MOOT1
Н.	THE APPELLANT HAS NOT WAIVED HER CLAIM TO COUNSEL UNDER RCW 28A.225.035(11)2
III.	THIS COURT SHOULD RECONSIDER PERKINS IN LIGHT OF SHELTON, ZEIGENFUSS AND KING3
IV.	THE PROSECUTOR HAS MISAPPREHENDED THE TEACHING OF MATHEWS v. ELDRIDGE; DUE PROCESS REQUIRES THE APPOINTMENT APPOINTMENT OF COUNSEL
V.	THE ASSERTED COST OF PROVIDING COUNSEL SHOULD NOT PREVAIL OVER THE DUE PROCESS RIGHTS OF THE ACCUSED CHILD12
VI.	THE STATE HAS MISAPPREHENDED THE COMPREHENSION ISSUE12
VII.	FAILURE TO SEND NOTICE TO E.S.' MOTHER IN HER OWN LANGUAGE VIOLATED DUE PROCESS 14
VIII.	THE RESPONDENT'S ENTIRE ARGUMENT LABELED 6(b) SHOULD BE STRICKEN14

TABLE OF CONTENTS- cont.

	<u> </u>	<u>PAGE</u>
IX.	THE RESPONDENT HAS MISAPPREHENDED THE WAIVER ISSUE	14
	CONCLUSION	16

TABLE OF AUTHORITIES

FEDERAL CASES	PAGE
Alabama v. Shelton, 535 U.S. 654 (2002)	3-6
In re Gault, 387 U.S. 1, 13 (U.S. 1967)	5-7
Johnson v. Zerbst, 304 U.S. 458, 464, 58 S. Ct. 1019, 82 L. Ed. 1461 (1938)	11-15
Matthews v. Eldridge, 424 U.S. 319 (1976)	4, 6, 8, 9, 12
Powell v. Alabama, 287 U.S. 45, 69 (1932)	6
STATE CASES	
City of Seattle v. Klein, 161 Wn.2d 554, 559 (2007)	15
De Young v. Providence Med. Ctr., 136 Wn.2d 136,146 (199	8) 3
In re Interest of J.L., 140 Wn. App. 438, 443 (2007)	2, 4
In re Interest of R.T. (M.B.), 101 Wn. App. 425, 433 (2000)	2, 4, 12
In re Marriage of King, 162 Wn.2d 378 (2007)	5, 7, 9
In re Welfare of Myricks, 85 Wn.2d 252, 254-255 (1975)	8
Kustura v. Dep't. of Labor & Indus., 142 Wn. App. 655 (200	08) 14
Leonard v. Bothell, 87 Wn.2d 847, 849 (1976)	1
State v. Chavis, 644 P.2d 1202, 1205, 31 Wn. App. 784, 789,790 (1982)	16
State v. Ziegenfuss, 118 Wn. App. 110 (2003), review denied 151 Wn.2d 1016 (2004)	, 4-6
Truancy of Perkins, 93 Wn. App. 590(1999), rev. denied, 138 Wn.2d 1003	3-4
Westerman v. Cary, 125 Wn.2d 277, 287 (1994)	1

TABLE OF AUTHORITIES

	PAGE
STATE STATUTES	
RCW 4.08.050 RCW 13.32A.250 RCW 26.09.110 RCW 28A.225.035 RCW 28A.225.035(12) RCW 28A.225.090	2 4 8 9 9-10 2, 4
RULES & STATE REGULATIONS	
RAP 2.5(a) WAC 137-104-050	3, 15 5-6
OTHER AUTHORITIES	
American Heritage Dictionary	3, 13

I. The Court Should Not Dismiss this Appeal as Moot

The prosecutor argues that this Court should dismiss this appeal as most because E.S. has not suffered loss of liberty. The record before this court is silent on loss of liberty.1

Washington appellate courts "will review a case which has become moot if it involves matters of substantial public interest." *Leonard v. Bothell*, 87 Wn.2d 847, 849 (1976), citations omitted. The court considers "the following criteria to determine whether to hear such a case: [1] the public nature of the question presented, [2] the desirability of an authoritative determination for the future guidance of public officers, and [3] the likelihood of future recurrence of the question." <u>Id.</u> See also, *Westerman v. Cary*, 125 Wn.2d 277, 287 (1994), holding that when the issue is likely to recur and the issue is one which is likely to escape review because the facts of the controversy are short lived, such as bail, the court will review the matter.2

Even if E.S. does not currently face the possibility of incarceration in Bellevue's original petition, she remains obligated to go to school and should she face another truancy petition, the issue of denial of counsel would recur. In addition, the issue will recur in other cases of children

¹ Although it is not in the record before this Court, Counsel will stipulate that E.S. has not been incarcerated, but she was subject to electronic home monitoring pursuant to the truancy contempt process. If the Court wishes, the record can be supplemented to include those orders.

² Counsel notes that the trial court issued an order striking the contempt in E.S.'s case and staying the matter until June 30, 2008. No further order has been entered in the trial court. (Order February 20, 2008, in trial court.)

facing truancy petitions without counsel. Because truancy cases typically are resolved within a matter of months, it can be impractical to obtain appellate review before they are moot. The issue is one of significant public interest and should be resolved.

The Court of Appeals in Division Two recently reviewed a truancy case despite the state's argument that no relief could be provided to the child.

The scope of a juvenile court's authority to incarcerate truants is an issue involving juveniles over whom the court frequently loses jurisdiction before the appeal process has run its course, rendering the individual case moot. But the issue of whether a truant can constitutionally be incarcerated under RCW 28A.225.090 is a continuing issue of substantial public interest.

In re Interest of J.L., 140 Wn. App. 438, 443 (2007).

See also, In re Interest of R.T. (M.B.), 101 Wn. App. 425, 433 (2000).

II. The Appellant Has Not Waived Her Claim to Counsel under RCW 28 A. 225.035 (11)

The prosecutor has misapprehended the appellant's argument concerning the trial court's obligation under the statute. It is the court that must assess whether a child fairly can proceed without counsel, not the child who must demand counsel. Resp. Br. at 7-8.

The state argues that E.S. has waived her claim that the trial court failed to exercise its discretion under RCW 28A.225.035 (11) which provides: "The court may permit the first hearing to be held without requiring that either party be represented by legal counsel, and to be held without a guardian ad litem for the child under RCW 4.08.050." Resp. Br.

at 8. 3 The prosecutor says that because E.S. did not request counsel, she has waived her right under RAP 2.5 (a). <u>Id.</u>

The statutory language permits a court to proceed without counsel, and that language implies that the court will make a case by case assessment of the need for counsel to protect the child's rights. The case law cited by the appellant in her opening brief in this court makes clear that children are presumed to be unable to proceed without counsel. See, De Young v. Providence Med. Ctr., 136 Wn.2d 136,146 (1998), Appellant's Brief at 16. The state has not responded to this argument.

A child who is presumed unable to proceed without counsel cannot be expected to understand that she has a right to request a lawyer, particularly when the court never offers her a lawyer and no lawyer is available to her. The appellant clearly argued in the trial court in her motion to set aside the truancy finding and in her motion for revision that there should be at least a case by case right to counsel, as the statute contemplates. CP 87-88; CP 191-197. There certainly was no intentional and intelligent waiver of a known right to counsel.

III. This Court Should Reconsider Perkins in Light of Shelton, Zeigenfuss, and King

The prosecutor argues that this Court should not reverse the holding in *Truancy of Perkins*, 93 Wn. App. 590(1999), rev. denied, 138 Wn.2d 1003; 984 P.2d 1033 (1999), because "nothing has changed". Resp. Br. at 8. In fact, what has changed are the Court's

³ The American Heritage Dictionary defines *permit* as follows: "To allow the doing of (something); consent to...."

holdings regarding punitive contempt. The Court in *Perkins* held that "the trial courts are entitled to order punitive contempt for failure to comply with an order of truancy." *Perkins*, 93 Wn. App. 590, 592 [emphasis added.]. But the Court later held:

We hold that juvenile courts may impose detention as a *remedial* sanction for contempt under RCW 13.32A.250 and RCW 28A.225.090, so long as a proper purge condition provides the juvenile with the keys to his or her release. We also hold the rules of evidence apply in proceedings under RCW 13.32A.250, and that witnesses must testify under oath.

In re Interest of R.T. (M.B.), 101 Wn. App. 425, 472 (2000). [emphasis added.]

It is clear that the Court would not today allow punitive contempt without proper safeguards as it outlined for criminal contempt proceedings. See also, *In re Interest of J.L.*, 140 Wn. App. 438, 440 (2007): "Incarcerating truants is a punishment that may not be constitutionally imposed without first satisfying the due process protections attendant criminal prosecutions."

The *Perkins* Court did not address *Matthews v. Eldridge*, 424 U.S. 319 (1976), nor did it contemplate the privacy issues as discussed in the ACLU-W amicus brief.

The prosecutor also objects because two of the cases on which the appellant relies, *Alabama v. Shelton*, 535 U.S. 654 (2002), and *State v. Ziegenfuss*, 118 Wn. App. 110 (2003), review denied, 151 Wn.2d 1016 (2004), are criminal cases. Resp. Br. at 10. This argument misunderstands

the application of these cases as well as the import of *In re Marriage of King*, 162 Wn.2d 378 (2007).

While Zeigenfuss was a criminal case, the issue for which the appellant cites it relates to a civil proceeding. This Court made clear that there is a case by case right to counsel in Department of Corrections administrative hearings for people accused of not complying with their sentencing order, despite an administrative code provision stating that there is no right to counsel in such hearings. Ziegenfuss, 118 Wn. App. 110, 116. Department of Corrections hearings also are civil but can lead to incarceration. They are not heard before a court, but before a hearings officer. WAC 137-104-050. Similarly, the truancy fact finding hearing is a civil proceeding that can lead to incarceration.

The appellant recognizes that *Alabama v. Shelton* also is a criminal case and that it interpreted the Sixth Amendment to the United States Constitution. The Court held:

that a suspended sentence that may "end up in the actual deprivation of a person's liberty" may not be imposed unless the defendant was accorded "the guiding hand of counsel" in the prosecution for the crime charged.

Alabama v. Shelton, 535 U.S. 654, 658, citation omitted.

The United States Supreme Court has made clear that "neither the Fourteenth Amendment nor the Bill of Rights is for adults alone." *In re Gault*, 387 U.S. 1, 13 (U.S. 1967). In discussing the need for individualized consideration of children, the Court quoted New Jersey Supreme Court Chief Justice Vanderbilt:

"In their zeal to care for children neither juvenile judges nor welfare workers can be permitted to violate the Constitution, especially the constitutional provisions as to due process that are involved in moving a child from its home."

In re Gault, 387 U.S. 1, 19, fn. 25.

Relying on due process as the foundation for its decision, the Court wrote, citing *Powell v. Alabama*, 287 U.S. 45, 69 (1932):

The juvenile needs the assistance of counsel to cope with problems of law, to make skilled inquiry into the facts, to insist upon regularity of the proceedings, and to ascertain whether he has a defense and to prepare and submit it. The child "requires the guiding hand of counsel at every step in the proceedings against him."

In re Gault, 387 U.S. 1, 34. 4

The "guiding hand of counsel" language used in *Shelton* was also key to the Court in *Gault*. *Shelton* is a Sixth Amendment case and *Gault* relied on due process. The appellant here urges this Court to apply the reasoning used in both courts, relying on both statutory and constitutional due process provisions to require counsel in a truancy fact finding proceeding.

The Gault Court cited the President's Crime Commission recommendation:

that in order to assure "procedural justice for the child," it is necessary that "Counsel . . . be appointed as a matter of course wherever coercive action is a possibility, without requiring any affirmative choice by child or parent."

In re Gault, 387 U.S. 1, 38.

⁴ The Court noted that counsel would not interfere with juvenile court goals but "it seems that counsel can play an important role in the process of rehabilitation." [citation omitted.] *In re Gault*, 387 U.S. 1, 38.

While *Gault* was a delinquency case and this is a truancy case, the principle that counsel should be appointed when coercive action is a possibility applies in both types of cases.

There are many reasons why it is important from a practical standpoint to provide counsel, including to guard against mistakes that can occur when overworked school representatives do not have or do not provide to a busy court full information about an individual child. The *Gault* Court wrote:

The absence of substantive standards has not necessarily meant that children receive careful, compassionate, individualized treatment. The absence of procedural rules based upon constitutional principle has not always produced fair, efficient, and effective procedures. Departures from established principles of due process have frequently resulted not in enlightened procedure, but in arbitrariness. [citations omitted.]

In re Gault, 387 U.S. 1, 18-19.

The state briefly cites *In re Marriage of King*, 162 Wn.2d 378 (2007), to support its position that liberty interests in certain civil cases do not require the protection of appointed counsel. Resp. Br. at 11, 14. It fails to examine the key elements of the Court's holding.

The appellant recognizes that the state Supreme Court rejected a case-by-case analysis of the right to counsel in dissolution proceedings as "unwieldy, time-consuming, and costly." *In re Marriage of King*, 162 Wn.2d 378, 390, fn. 11. But the Court emphasized that a dissolution proceeding involves two private parties. It is not initiated by the

government and the individual is not facing "the superior power of state resources in the proceedings." *Id.* at 385.

Notably, the *King* Court pointed out that the court has the authority in a dissolution case to appoint an "attorney to represent the children's interests at public expense when the parties are indigent," under RCW 26.09.110. *King*, 162 Wn.2d 378, 387.

The following factors are important in deciding whether there is a right to appointed counsel:

- 1. Did the government initiate the action? *King*, 162 Wn.2d 378, 386.
- 2. What are the relative powers of the parties? *King*, 162 Wn.2d 378, 394.
- 3. Can the initial proceeding, even if only preliminary to later and more final pronouncements, lead to further proceedings that can result in deprivation of liberty? *In re Welfare of Myricks*, 85 Wn.2d 252, 254-255 (1975).

The factors that the Court found important in *Myricks*, justifying the appointment of counsel, are just as true in a truancy hearing for a 13 year old child, who, similarly to a parent in a dependency case, has to

match wits with social workers, counselors, psychologists, and physicians and often an adverse attorney; cross-examine witnesses (often expert) under rules of evidence and procedure of which he or she usually knows nothing; deal with documentary evidence he or she may not understand, and all to be done in the strange and awesome setting of the juvenile court.

Myricks, 85 Wn.2d 252, 254-255.

IV. The Prosecutor Has Misapprehended the Teaching of Mathews v. Eldridge; Due Process Requires the Appointment of Counsel

The state has misapprehended the import of the federal due process

balancing test articulated in *Mathews v. Eldridge*, 424 U.S. 319 (1976). The appellant urges that she has a fundamental liberty interest that is greater than that in a dissolution proceeding, so the ruling in *King* that the reduced liberty interest led to the application of the balancing test should not apply. She adds that if this Court does not find a liberty interest engaged, then she still should have counsel under the balancing test. App. Br. at 29-30.

The state argues that the child's private interest in education is well protected by existing procedures that require the school district to evaluate the child properly before bringing a petition for truancy. Resp. Br. at 18. The state asserts:

By the time the child gets to the petition phase, there has been intervention done by the school where issues such as mental health and special needs can be discovered and explored. Should those issues arise, the school district would not have a good faith belief that the child was willfully being truant and therefore would not file the petition. Resp. Br. at 18.

There is simply nothing in the record to support such a global statement. The reality is that there is no protection under the statute to make sure that the child does not have mental health or special education needs that contribute to the truancy. And as evidenced by the hearing in E.S.'s case, the court does not necessarily inquire into the child's needs or ability to understand the proceedings. The Court did not address the facts alleged in the petition and the circumstances of the child, nor did it address how its order would "most likely cause the juvenile to return to and remain in school...." See RCW §28A.225.035. Other than a brief

inquiry about the child's stomach ailment, the court did not ask any questions about her needs or her schooling or her home situation. VRP 3/6/2006.

Without a lawyer, there is no meaningful way for a child to test the school district's compliance with the statutory requirements or to assert special education needs or mental health concerns. The prosecutor is assuming that the school will have done all it is required to do under the law before filing a petition. That assumption ignores the pressures on even well-intentioned school representatives who have heavy volumes, who may not have the opportunity to meet the child before the filing of a petition, and who most likely are not legally trained.

As the amici have pointed out, there are a myriad of reasons why children do not attend school. Without a lawyer, the children are less likely to be able to guard against a mistaken petition or to assert their individual needs.

The prosecutor also asserts that the hearings are informal, the school is not usually represented by an attorney, and there is no formal direct or cross-examination. Resp. Br. at 18. The prosecutor's description of truancy proceedings is totally without reference to authority.5 As the

⁵ Practices vary from county to county, but the school district has the burden under the statute to prove the allegations in the petition. RCW 28A.225.035(12). According to the Klickitat County web page discussing truancy hearings,

The respondent is thereafter allowed to put on a defense or dispute the truancy petition if they so desire. They are able to testify as to why they believe it is a unnecessary and to submit documents of their own such as a letter from a doctor indicating the youth is excused from

appellant pointed out in her opening brief, the Pierce County Prosecutor files more than 1000 truancy cases per year. App. Br. Fn 4. The King County Prosecutor is representing the school district in this case. In addition, the commissioner told E.S. and her mother that they could have a formal hearing with testimony under oath if they chose to do so.

You were both entitled to have a hearing this morning if you do not agree that there should be a court order that requires E. to go to school. And a hearing means that I would swear both of you under oath and hear from both of you why you did or did not think the order should be put in place. I would also swear Mr. Hasslinger in under oath and listen to what he wanted to say in response.

VRP 3/6/2006 at 2-3.

The prosecutor also asserts, without authority, that the "rules of evidence are generally relaxed". Resp. Br at 18-19. This is at odds with the implication of the commissioner's remarks. The Court of Appeals has

school. It should be noted that while a psychosomatic excuse, i.e. anxiety, nausea, stress, is not necessarily an excuse to avoid a truancy order (physical sickness would likely be a better excuse) the court will not overlook psychosomatic disorders that are disabling. The state has an opportunity to cross examine the parent and the court makes its ruling upon conclusion of the evidence being submitted.

Apparently the Klickitat court sees the burden as being to some extent on the child, as the web page also states:

The court thereafter will swear in the parties and inquire of the respondent whether there is any reason that a truancy order (or a contempt order) should not be signed. If they can voice no reason why there should be no order, the court enters one minus an attorney being assigned (this goes even for contempt hearings if respondent has not requested an attorney in advance).

The view that the child has to request an attorney in advance of the hearing is inconsistent with the principles of waiver of counsel as outlined in *Johnson v. Zerbst*, 304 U.S. 458 (1938).

http://www.klickitatcounty.org/juvenile/ContentROne.asp?fContentIdSelected=19432128 34&fCategoryIdSelected=%2D68170427&fX=X,visited August 24, 2008.

held that in a truancy contempt proceeding, "the rules of evidence apply, and witnesses must be sworn." *In re Interest of R.T. (M.B.)*, 101 Wn. App. 425, 431 (2000).

V. The Asserted Cost of Providing Counsel Should Not Prevail Over The Due Process Rights of the Accused Child

Without any authority, the prosecutor asserts that "the financial and administrative burdens requiring appointed counsel would be extreme." Resp. Br. at 20. The *Matthews* Court made clear that "Financial cost alone is not a controlling weight in determining whether due process requires a particular procedural safeguard prior to some administrative decision." *Mathews v. Eldridge*, 424 U.S. 319, 348.

The prosecutor makes a series of unsupported assertions about the informality of the proceedings and the lack of a role of the prosecutor as reasons why counsel is not needed for the child in a truancy hearing. The state ignores the fact that the school district is an arm of government and has superior resources to those of the child. It also ignores the statement of the elected prosecutor on its own web site: "As many of you know, our office is deeply committed to enforcing our state's truancy laws." http://www.metrokc.gov/proatty/truancy/index.htm, visited July 13, 2008. That web site also includes 21 form documents for schools to use in what the state in its brief describes as an informal proceeding. Id.

VI. The State has Misapprehended the Comprehension Issue

The appellant argued in her opening brief that because the words

used by the Court in its discussion with E.S. were beyond her grade level, she needed an attorney to assist her in court. App. Br. at 36 et. seq. The state argues that because E.S. did not discuss the Flesch-Kincaid grade level assessment test in the trial court, she should not be allowed to discuss it here. Resp. Br at 21. The appellant has pointed out the comprehension level as another factor supporting the due process need for counsel. It simply is not fair to expect a child of 13 to comprehend legal terms and vocabulary that are beyond her understanding. One does not need a grade level assessment test to realize that a 13-year-old with school attendance issues and whose mother does not speak English fluently might not understand the use in a court setting of words such as entitled, motion, sanction, oath, community service, contempt, valid, and evaluations. See VRP 3/6/2006. Those words can be confusing to a child of 13 whether she hears them or reads them. And as the appellant has pointed out, the word "detention" for school children generally means staying after school, not going to jail.6

In addition, as discussed below, the school sent all of its documents to the family in English. The prosecutor acknowledges that the Flesch-Kincaid test assesses reading ability.

⁶ The American Heritage Dictionary defines detention as follows: The act of detaining.

^{1.} The state or a period of being detained, especially:

a. A period of temporary custody while awaiting trial.

b. A period of confinement to a detention home.

c. A form of punishment by which a student is made to stay after regular school hours.

^{2.} A forced or punitive delay.

The appellant does not offer the discussion of the Flesch-Kincaid test as substantive evidence of E.S.'s comprehension of the court's warnings and advice. The test is useful in helping to understand why counsel was necessary to provide a fair hearing.

VII. Failure to Send Notice to E.S.' Mother in Her Own Language Violated Due Process

With no citation to authority, the prosecutor argues that the school did not know Ms. S needed an interpreter and if it had, it could have provided one. Resp. Br. at 23. The trial court used an interpreter. See, VRP 3/6/2006. The state's argument asserts facts that are inconsistent with the record, and ignores the import of *Kustura v. Dep't. of Labor & Indus.*, 142 Wn. App. 655 (2008). The relevance of *Kustura* is that the Court did not find a denial of due process in a notice in English when the non-English speaker claimant had an attorney who spoke English. Neither E.S. nor her mother had an attorney. A mother who has trouble communicating effectively in English is of little help to her child either in a conference with school representatives or on a telephone call with them, and will be of little help in interpreting letters from the school written in English.

VIII. The Respondent's Entire Argument Labeled 6 (b) Should Be Stricken

In asserting that the school district met its statutory obligations, the respondent has produced a series of asserted facts, including about actions alleged to have occurred in 2007, long after the truancy hearing at issue in this case. This entire section is irrelevant. What happened after the Appellant's Reply Brief

14

truancy hearing has nothing to do with whether the school district met its statutory obligations prior to filing the petition. The prosecutor cites the RP for the March 6, 2006, hearing, at 5-6, in support of its claims. Obviously, nothing that happened at that hearing is evidence for or can support claims of what the school district did after that hearing. This entire section (portions of page 23, page 24, and part of page 25) should be stricken.

IX. The Respondent Has Misapprehended The Waiver Issue

The state argues that E.S. did not raise in the trial court the issue of a knowing and voluntary waiver of her right to a contested hearing, and therefore should not be allowed to raise here that challenge to the truancy finding. Resp. Br. at 26.

Whether a child has made a knowing and voluntary waiver of a right is a constitutional issue and under RAP 2.5 (a), a manifest error affecting a constitutional right may be raised for the first time on appeal. The Washington Supreme Court recently wrote, in finding that the defendants had not waived their right to appeal, "When constitutional rights are involved, we require the government to bear the burden to prove 'an intentional relinquishment or abandonment.' *Johnson v. Zerbst*, 304 U.S. 458, 464, 58 S. Ct. 1019, 82 L. Ed. 1461 (1938)." *City of Seattle v. Klein*, 161 Wn.2d 554, 559 (2007).

The prosecutor notes that when the commissioner asked E.S. and her mother whether they agreed to an order, they said, "Yes." Resp. Br at

26. Simple yes or no questions have been criticized by the Court. "...[T]he court should question the accused in a manner designed to reveal understanding, rather than framing questions that call for a simple "yes" or "no" response." *State v. Chavis*, 644 P.2d 1202, 1205, 31 Wn. App. 784, 789,790 (1982).

The trial court did not make an adequate finding that E.S. properly waived her right to a contested hearing, and the appellant should be allowed to argue that in this Court.

CONCLUSION

A 13-year-old child faced a court hearing in which without counsel and without any meaningful inquiry by the court as to what the child understood, she waived her right to a hearing and agreed that she was truant, establishing the foundation for later contempt hearings in which she could face incarceration. The court made no attempt to ensure that the child understood the burden on the school district under the statute or that she understood words that she said she understood. The court made no inquiries about her individual needs or concerns other than a brief inquiry about a stomach ache. The proceeding was brought by a school district, an arm of government. The truancy finding led to later contempt hearings in which the child's liberty was at stake.

The truancy finding should be reversed because no counsel was provided, violating the child's due process rights, because the court did not make a finding that the child understood the language used by the court, because the school district did not meet its obligation to provide notice to

the parent that the parent could understand, and because the child did not properly waive her right to a contested hearing.

DATED this 29th day of August 2008.

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CERTIFICATE OF SERVICE

I, Alicia Reise, under penalty of perjury under the laws of the State of Washington that on August 29, 2008, I caused to be served on the persons listed below the motion to strike part of the brief of the Respondent and Appellant's Reply Brief by placing it in the United States Mail, First Class.

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Dated this 29th day of August, 2008.

Appellant's Reply Brief

18